

# NO CONSTITUTIONAL RIGHT TO BE A BULLY: THE FIRST AMENDMENT PRINCIPLE OF CONTENT NEUTRALITY AND REGULATING BULLYING IN PUBLIC SCHOOLS

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The problem of bullying has been shrouded in myth and misunderstanding for far too many years. As educators . . . we simply have not taken the problem of bullying seriously enough . . . [it] is very much an education priority that goes to the heart of school performance and school culture.  
- United States Secretary of Education Arne Duncan.<sup>1</sup>

## I. INTRODUCTION

In the fall of 2012, almost fifty million students attended public elementary and secondary schools in the United States (“U.S.”).<sup>2</sup> Studies indicate that twenty to thirty percent of students in grades six through twelve are victims of bullying at school.<sup>3</sup> Forty-nine states have enacted legislation against student speech that constitutes bullying.<sup>4</sup> The surge of interest in anti-bullying legislation and research was due to a public outcry against bullying-related student suicides.<sup>5</sup> In August 2010, the U.S. Departments of Education, Health and Human Services, Agriculture, the Interior, and Justice sponsored the Federal National Bullying Summit in Washington, D.C.<sup>6</sup> Secretary of Education Arne Duncan announced the purpose of this federal summit, the first on the issue, as a “launch [of the] sustained

<sup>1</sup> Arne Duncan, U.S. Sec’y of Education, *The Myths About Bullying: Remarks at the Bullying Prevention Summit* (Aug. 11, 2010), *available at* <http://www.ed.gov/news/speeches/myths-about-bullying-secretary-arne-duncans-remarks-bullying-prevention-summit>.

<sup>2</sup> *Facts About Bullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/news/media/facts/#ftn9> (last visited March 14, 2014).

<sup>3</sup> *Id.*

<sup>4</sup> The only state without an anti-bullying law is Montana. *Policies and Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/> (last visited May 20, 2014); *see also* BULLYPOLICE.ORG, [bullypolice.org](http://bullypolice.org) (last visited May 20, 2014) (reporting that as of April 2014, Montana is “STILL the ONLY state” without such a law).

<sup>5</sup> *See* Samantha Neiman, Brandon Robers & Simone Robers, *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 609 (citing Susan M. Swearer et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 EDUC. RESEARCHER 38, 38 (2010)).

<sup>6</sup> *Federal Partners in Bullying Prevention Summit*, JUV. JUST. VT. (Oct. 16, 2010), <http://www.juvenilejusticevt.org/juvenile-justice/federal-partners-in-bullying-prevention-summit/> (last visited May 20, 2014).

commitment to address and reduce bullying.”<sup>7</sup> However, no federal law currently exists that addresses bullying directly.<sup>8</sup> Instead, bullying may constitute discriminatory harassment, which is addressed by several federal civil rights laws.<sup>9</sup> When bullying is based on race, national origin, color, sex, age, disability, or religion, it may violate one of these federal civil rights laws. A school that receives federal funding has an obligation to address and remedy the harassment.<sup>10</sup>

On January 5, 2011, New Jersey Governor Chris Christie signed the Anti-Bullying Bill of Rights Act into law.<sup>11</sup> New Jersey is one of the many states that enacted or recently strengthened their anti-bullying statutes. Labeled the country’s “toughest law against bullying and harassment in schools,”<sup>12</sup> it was enacted just months after the tragic suicide of Tyler Clementi, a Rutgers University undergraduate

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<sup>7</sup> Duncan, *supra* note 2.

<sup>8</sup> Anti-bullying legislation has been proposed at the national level on numerous occasions during the last decade. In 2004, federal anti-bullying legislation was proposed in the House of Representatives as an amendment to the Safe and Drug-Free Schools and Communities Act. H.R. 4776(g)(12)(B), (13)(B), 108th Cong. (2004). In 2009, a bill was introduced in the House of Representatives titled, “Megan Meier Cyberbullying Prevention Act.” H.R. 1966, 111th Cong. § 3(a) (1st Session 2009). An amendment to the Safe and Drug-Free Schools and Communities Act was re-introduced in 2009. H.R. 2262, 111th Cong. (2009). In 2011, the Safe Schools Improvement Act of 2011 was introduced in the Senate. H.R. 1648, 112th Cong. (2011).

<sup>9</sup> See, e.g., Title IV and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d–7 (2012); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1654 (2012); Titles II and III of the Americans with Disabilities Act, 42 U.S.C. § 12101 (2012); Individuals with Disabilities Education Act, 20 U.S.C. § 1415 (2012).

<sup>10</sup> *Federal Laws*, STOPBULLYING.GOV, U.S. DEPT. OF HEALTH AND HUM. SERVS., <http://www.stopbullying.gov/laws/federal> (last visited May 20, 2014).

<sup>11</sup> N.J. STAT. ANN. § 18A:37-13.1–32 (West 2012).

<sup>12</sup> Richard Perez Pena, *Christie Signs Tougher Law on Bullying in Schools*, N.Y. TIMES (Jan. 6, 2011), *available at* [http://www.nytimes.com/2011/01/07/nyregion/07bully.html?\\_r=0](http://www.nytimes.com/2011/01/07/nyregion/07bully.html?_r=0); see also Emmeline Zhao, *New Jersey’s Anti-Bullying Law, Toughest in Country Garner Praise and Criticism*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/09/02/new-jerseys-anti-bullying\\_n\\_946625.html](http://www.huffingtonpost.com/2011/09/02/new-jerseys-anti-bullying_n_946625.html) (“The law . . . is said to be the toughest piece of anti-bullying legislation in the country.”) (last updated Nov. 2, 2011, 6:12 AM).

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student who was bullied by his peers for his sexuality.<sup>13</sup> According to the New Jersey Department of Education, the intent of the anti-bullying legislation is to “strengthen standards and procedures for preventing, reporting, investigating[,] and responding to HIB [harassment, intimidation, and bullying] incidents of students in school and off school premises.”<sup>14</sup>

This New Jersey anti-bullying statute requires school districts to follow specialized protocols in reporting and investigating all bullying complaints.<sup>15</sup> The law does not authorize a private right of action against a school district if it fails to follow or implement the law properly.<sup>16</sup> However, the New Jersey Law Against Discrimination (“LAD”) does recognize a private cause of action against a school district for student-on-student affectional or sexual orientation

<sup>13</sup> Tyler committed suicide on September 22, 2010, three weeks into his first semester of college at Rutgers University in New Brunswick, New Jersey. Lisa W. Federaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 29, 2010), *available at* <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?ref=tylerclementi>. Tyler jumped off the George Washington Bridge after realizing that his roommate had set up a video camera recording a sexual encounter between himself and another man. Tyler’s roommate was found guilty of bias intimidation, invasion of privacy, hindering apprehension and tampering with evidence. He served 20 days in prison. Madison Gray, *Dharun Ravi: Tyler Clementi’s Roommate Sentenced to 30 Days in Jail*, TIME (May 21, 2012), *available at* <http://newsfeed.time.com/2012/05/21/dharun-ravi-tyler-clementis-roommate-sentenced-to-30-days-in-jail/>.

<sup>14</sup> *Guidance for Schools on Implementing the Anti-Bullying Bill of Rights Act (P.L. 2010, c.122)*, N.J. DEP’T OF EDUC. 6 (Dec. 2011), <http://www.nj.gov/education/students/safety/behavior/hib/guidance.pdf>.

<sup>15</sup> See Anti-Bullying Bill of Rights Act, N.J. STAT. ANN. § 18A:37-15; *see also* Isabel Machado & Carolyn Chaudry, *Everything You’ve Wanted to Know About the Anti-Bullying Bill of Rights Act*, NEW JERSEY LAWYER, Dec. 2013, at 15.

<sup>16</sup> The Act specifically states that it does not alter or create any tort liability. N.J. STAT. ANN. § 18A:37-37; *see* Thomas v. East Orange Bd. of Educ., No. 2:12-01446 (WJM), 2014 WL 495133, at \*13 (D.N.J. Feb. 6, 2014) (rejecting plaintiff’s attempt to use the law as a basis for a negligent infliction of emotional distress claim against defendant school district). Some have criticized the law’s lack of a private right of action against school districts as not going “far enough.” *Civil Rights Attorney Comments on New Jersey Anti-Bullying Law*, SCH. SAFETY PARTNERS (Jan. 16, 2011), <http://www.schoolsafetypartners.org/law/751-Civil-Rights-Attorney-Comments-New-Jersey-Anti-Bullying-Law.html> (last visited May 20, 2014).

harassment.<sup>17</sup> When the school district “knew or should have known of the harassment but failed to take actions reasonably calculated to end the mistreatment and offensive conduct,” it may be liable to a student for such harassment.<sup>18</sup>

States, local governments, and school districts, in attempting to resolve the ongoing bullying crisis within our public school systems, are enacting anti-bullying laws and policies that may infringe on students’ First Amendment rights. In the implementation of these laws, school administrators must balance the need to protect their students’ emotional and physical well being with their constitutional First Amendment rights. Despite the attempts to strike a balance, the New Jersey anti-bullying statute has been critiqued on various First Amendment grounds. Some perceive the statute as potentially overbroad in its definition of prohibited conduct, and they contemplate the law could infringe upon religious and political freedoms of students.<sup>19</sup>

In *Tinker v. Des Moines School District*,<sup>20</sup> the Supreme Court held that a public school cannot punish a student’s speech unless it “‘materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.’”<sup>21</sup> Some of these laws, including

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<sup>17</sup> L.W. *ex rel.* L.G. v. Toms River Reg’l Sch. Bd. of Educ., 189 N.J. 381, 389-90 (N.J. 2007).

<sup>18</sup> *Id.* at 390.

<sup>19</sup> Derek Bambauer, *Cyberbullying and the Cheese-Eating Surrender Monkeys*, CONCURRING OPINIONS, (Feb. 21, 2012, 10:20 PM), <http://www.concurringopinions.com/archives/2012/02/cyberbullying-and-the-cheese-eating-surrender-monkeys.html>. Professor Bambauer was a panelist at the Seton Hall Law Legislative Journal’s 2012 Symposium titled, “Bullying and the Social Media Generation: the Effects of the New Jersey Anti-Bullying Statute on School Administration, Students, and Teachers.” See also Lindsay Nash, *New Jersey’s Anti-Bullying Fix: A Solution or the Creation of an Even Greater First Amendment Problem*, 2012 B.Y.U. L. REV. 1039, 1063 (2012) (labeling the New Jersey anti-bullying law as “on its face overbroad because it extends into the realm of constitutionally protected off-campus student speech.”).

<sup>20</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>21</sup> *Id.* at 513.

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New Jersey's, also permit school officials to punish off-campus bullying.<sup>22</sup> New Jersey's recently amended anti-bullying law incorporates the *Tinker* standard by requiring that the bully's speech "substantially disrupt[] or interfere[] with the orderly operation of the school or the rights of other students."<sup>23</sup>

One of the concerns with the New Jersey anti-bullying law is that it is a content-based restriction.<sup>24</sup> This federal First Amendment principle of content neutrality requires that the government be a neutral arbiter in regulating all speech, even when it is unprotected. The Supreme Court has clarified that the government cannot pick and choose what it will punish even when it is punishing unprotected speech. Instead of prohibiting all bullying that is proscribable and unprotected under *Tinker*, the New Jersey Anti-Bullying Bill of Rights enumerates certain characteristics that may motivate a student to harass, intimidate, or bully another student.<sup>25</sup> Some states have

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<sup>22</sup> N.J. STAT. ANN. § 18A:37-14 (West 2011) (requiring school officials to report bullying that "takes place on school property, at any school-sponsored function, on a school bus, or off school grounds").

<sup>23</sup> *Id.*

<sup>24</sup> See Part II for a discussion of the content neutrality principle and its application in the realm of student speech in public schools.

<sup>25</sup> N.J. STAT. ANN. § 18A:37-14 (West 2011) (The statute punishes "any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by another other distinguishing characteristic that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that . . . a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property; [] has the effect of insulting or demeaning any student or group of students; or [] creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.").

enacted similar anti-bullying laws with enumerated characteristics.<sup>26</sup>

This Note will focus on the issue of the New Jersey anti-bullying law's potential violation of the First Amendment's content neutrality principle. It will discuss whether the regulation of student speech in public schools is subject to this principle. This Note argues that the principle of content neutrality, in the realm of independent student speech that causes a substantial disruption under *Tinker*, should be relaxed when dealing with the regulation of bullying. Specifically, this Note will focus on New Jersey's revised anti-bullying law; namely, how content discrimination should be permitted in this context because bullying is a serious impediment to the state's ability to carry out its educational mission. Further, the traditional justifications for the principle of content neutrality, including the marketplace of ideas theory have less force in the context of student speech in public schools. Our society's commitment to freedom of speech must be balanced with the state's need to educate our students— whose speech interests in the context of bullying legislation must give way to other countervailing concerns.

Part II of this Note sets out the background of the New Jersey Anti-Bullying Bill of Rights and presents potential legal challenges to the law. It also discusses the principle of content neutrality and applies it to the New Jersey anti-bullying statute. Part III sets out relevant case law handed down after the Supreme Court's decision in *Tinker* and explains the application of the content neutrality principle in the public school context. Finally, Part IV sets out this Note's core argument and concludes that content-based regulations should be permitted in a state's regulation of bullying in public schools.

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<sup>26</sup> See e.g., 105 ILL. COMP. STAT. ANN. 5.27-23.7(a) (West Supp. 2011) (punishing bullying based on "race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, [and] unfavorable discharge from military service"); N.Y. EDUC. LAW § 12(1) (McKinney) (prohibiting acts "based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender[, or sex]").



## II. THE NEW JERSEY ANTI-BULLYING BILL OF RIGHTS ACT AND A POTENTIAL CHALLENGE ON THE BASIS OF CONTENT DISCRIMINATION

### A. *The New Jersey Anti-Bullying Bill of Rights Act*

On November 22, 2010, the New Jersey Legislature passed the Anti-Bullying Bill of Rights Act with overwhelming support in both houses.<sup>27</sup> The legislation became effective on September 1, 2011.<sup>28</sup> The law was enacted after a number of studies were conducted on the effects and prevalence of bullying. The legislative findings specifically reference, but do not cite, a 2009 study by the United States Department of Justice and Education, which reported that thirty-two percent of students, ages twelve through eighteen, were bullied during the prior school year.<sup>29</sup> Further, the study found that twenty-five percent of the public schools that responded to the survey indicated that bullying was an issue on a daily or weekly basis within their schools.<sup>30</sup> Media coverage of bullying-related suicides was also a catalyst for the anti-bullying statute. The legislative findings acknowledge that the “chronic persistence of school bullying ha[d] led to student suicides across the country, including in New Jersey.”<sup>31</sup>

The declared intent by the New Jersey Legislature in enacting the anti-bullying law was to “strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.”<sup>32</sup> The statute did indeed strengthen New Jersey’s existing anti-bullying law by implementing extensive training programs for school staff along with speedy response

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<sup>27</sup> *Anti-Bullying*, NEW JERSEY EDUCATION ASSOCIATION, <http://www.njea.org/issues-and-political-action/anti-bullying> (last visited Jan. 12, 2013).

<sup>28</sup> N.J. STAT. ANN. § 18A:37-13.1 (West 2010).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

methods for bullying incidents, among other changes. The law requires that teachers and school staff report bullying incidents to principals on the same day that the bullying incident occurs. The investigation of the incident must begin within one school day, and the investigation must be completed within ten school days.<sup>33</sup> The anti-bullying law is not limited to student-on-student bullying incidents, as it also covers staff-on-student bullying.<sup>34</sup> However, the statute does not apply to staff-on-staff situations.<sup>35</sup>

The law's co-sponsor, state senate majority leader Barbara Buono, called it "a powerful message to every child in New Jersey."<sup>36</sup> However, the initial response to the new anti-bullying law was mixed. Many perceived it as legally problematic for the state and public school administrators due to potential constitutional infirmities.<sup>37</sup> One school psychologist viewed it as "empowering children to use the term 'bullying' and to speak up for themselves and for others."<sup>38</sup> Some advocated that the New Jersey law should become a model anti-bullying law for other states.<sup>39</sup>

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<sup>33</sup> N.J. STAT. ANN. § 18A:37-15 (West 2012).

<sup>34</sup> John Mooney, *State's Tough New Anti-Bullying Legislation Isn't Just for Kids*, NJ SPOTLIGHT (Aug. 7, 2013), <http://www.njspotlight.com/stories/13/08/06/state-s-tough-new-anti-bullying-law-isn-t-just-for-kids/>.

<sup>35</sup> See Machado & Chaudry, *supra* note 16, at 16.

<sup>36</sup> Adam Cohen, *Why New Jersey's Antibullying Law Should be a Model for Other States*, TIME MAG. (Sept. 6, 2011), *available at* <http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states/>.

<sup>37</sup> See, e.g., J.D. Tuccille, *New Jersey Officials Use Anti-Bullying Law to Suppress Speech*, HIT AND RUN BLOG (July 3, 2012), <http://reason.com/blog/2012/07/03/new-jersey-officials-use-anti-bullying-l>; John Vettese, *Are new school anti-bullying laws fair, or unreasonable?*, LEONORE ANNENBERG INSTITUTE FOR CIVICS, <http://www.annenbergclassroom.org/speakouts.aspx?name=are-new-school-anti-bullying-laws-fair&AspxAutoDetectCookieSupport=1>.

<sup>38</sup> Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, NY TIMES (Aug. 30, 2011), *available at* <http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html>.

<sup>39</sup> Cohen, *supra* note 39.

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Critics of the law, however, believe that it is too onerous for teachers and too burdensome on the financially strained budgets of New Jersey school districts.<sup>40</sup> Initially, the anti-bullying statute did not provide any funds for its implementation.<sup>41</sup> After the law was challenged as an unfunded mandate, Governor Christie signed amendments that appropriated \$1 million in grants to maintain the law's constitutionality.<sup>42</sup>

*B. The Principle of Content Neutrality*

Another potential constitutional challenge to the New Jersey anti-bullying law is a violation of the First Amendment principle of content neutrality. The Supreme Court has made clear that the government cannot regulate speech based on its content.<sup>43</sup> The content neutrality principle has been labeled the “most pervasively employed doctrine in the jurisprudence of free expression.”<sup>44</sup> Under this doctrine, a law is content-based if its application is contingent on

<sup>40</sup> See John F. McKeon, *Commentary: Thanks to Gov. Christie, New Jersey's Suburban School Districts are Getting \$492 Million Less*, NEWSROOM N.J. (July 14, 2011, 11:36 AM), <http://www.newjerseynewsroom.com/commentary/thanks-to-gov-christie-new-jerseys-suburban-school-districts-are-getting-492-million-less>; Charles Hack, *Hudson County School Districts Complain Christie's Funding for Anti-Bullying Initiative Doesn't Go Very Far*, NJ.COM (July 12, 2012, 3:00 AM), [http://www.nj.com/jjournal-weeklies/index.ssf/2012/07/hudson\\_county\\_school\\_districts.html](http://www.nj.com/jjournal-weeklies/index.ssf/2012/07/hudson_county_school_districts.html) (indicating that the Hoboken school district only received \$154.00 for the implementation of its anti-bullying efforts).

<sup>41</sup> *New Jersey Not Fully Funding Schools for Reimbursements to Implement Anti-Bullying Legislation*, NAT'L SCH. BD. ASS'N (July 12, 2012), <http://legalclips.nsba.org/?p=15307>.

<sup>42</sup> See N.J. STAT. ANN. § 18A:37-19 (providing reimbursement to school districts for program costs); Surveys conducted regarding the financial and staffing impacts of the law on school districts revealed that more than \$2 million was actually spent by school districts in 2011-2012 to implement anti-bullying programs in compliance with the law. There remains to be seen whether the law will once again be challenged as an unfunded state mandate. *Governor Signs Anti-Bullying Amendments*, N.J. SCH. BDS. ASS'N, [http://www.njsba.org/sb\\_notes/20120327/hib.html](http://www.njsba.org/sb_notes/20120327/hib.html) (last visited Mar. 5, 2013).

<sup>43</sup> *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980).

<sup>44</sup> Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

the speech's message— whether it is the subject matter of the message or the viewpoint the message expresses. When a regulation is impermissibly content-based, courts will apply strict scrutiny.<sup>45</sup> To achieve content neutrality, the government must regulate speech in both a subject-matter and a viewpoint neutral manner.<sup>46</sup>

Subject-matter discrimination occurs when the government targets speech because of the subject or topic it addresses.<sup>47</sup> Viewpoint discrimination is discrimination on the basis of the “speaker’s specific motivating ideology, opinion, or perspective.”<sup>48</sup> At times, these two categories overlap, and the Court itself has admitted that the distinction between the two is not precise.<sup>49</sup>

The Supreme Court’s concern with content-based discrimination is that the government, through its regulation of speech, will “suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.”<sup>50</sup> The principle of content neutrality requires that the government be a neutral arbiter in regulating speech. Federal, state, and local governments, therefore, cannot take sides in public debate.

In *R.A.V. v. City of St. Paul*, the Court made clear that the principle of content neutrality applies even when the government is regulating unprotected speech.<sup>51</sup> The City of St. Paul, Minnesota

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<sup>45</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *see also* *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 540 (1980) (“Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.”).

<sup>46</sup> Erwin Chemerinsky, *Content Neutrality As A Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

<sup>47</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 819-20 (1995).

<sup>48</sup> *Id.* at 820.

<sup>49</sup> *See id.* at 830.

<sup>50</sup> *Turner Broad Sys., Inc.*, 512 U.S. at 641.

<sup>51</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992) (“These areas of speech

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enacted a law which made it a misdemeanor to place on public or private property a symbol, object, appellation, characterization, or graffiti—including a burning cross, which one knows or has reasonable grounds to know “arouses anger, alarm or resent in other on the basis of *race, color, creed religion[,] or gender*.”<sup>52</sup> The defendant moved to dismiss the charge against him on the basis that the ordinance was content-based and thus invalid on its face.<sup>53</sup>

The Supreme Court found the ordinance facially unconstitutional for a number of reasons.<sup>54</sup> Namely, the ordinance did not apply to all fighting words— a category of unprotected speech; it only applied to those that insulted or provoked violence on the basis of certain characteristics such as race, color, creed, religion, or gender.<sup>55</sup> The regulation of this speech was based on its topic and was therefore subject-matter based. Other displays were permissible under the ordinance if they did not fall within these specified categories.<sup>56</sup> To illustrate the application of the content neutrality principle to unprotected speech, the Court explained that even though the government is permitted to restrict all libel, it could not

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can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)— not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”) (emphasis in original).

<sup>52</sup> *Id.* at 380 (emphasis in original). The ordinance stated, “[w]hoever places on public or private property a symbol, object, appellation, characterization[,] or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm[,] or resentment in others on the basis of race, color, creed, religion[,] or gender commits disorderly conduct and shall be guilty of a misdemeanor.” *Id.*

<sup>53</sup> *R.A.V.*, 505 U.S. at 380. The defendant and several teenagers were charged under the ordinance for burning a cross inside the yard of a Black family. *Id.* at 379.

<sup>54</sup> *R.A.V.*, 505 U.S. at 381.

<sup>55</sup> *Id.* at 378.

<sup>56</sup> *Id.* at 391. The Court gave the examples of other categories such as “political affiliation, union membership, or homosexuality” that could be used as fighting words but were not covered by the ordinance at issue.

proscribe libel only critical of the government.<sup>57</sup> The ordinance was also impermissibly viewpoint based, as it only punished fighting words that involved these certain categories.<sup>58</sup>

*C. Challenges to New Jersey's Law Under the Content Neutrality Principle*

As stated by the majority in *R.A.V.*, content discrimination of speech is present when the regulation or policy discriminates against speech on the basis of the speaker's message.<sup>59</sup> Whether a regulation is content neutral depends on whether the speech regulation is imposed to restrict the topic or viewpoint being discussed. When a regulation is content-based, the courts will apply strict scrutiny.<sup>60</sup>

In *R.A.V.*, the city of St. Paul chose to prosecute the defendants under the Bias-Motivated Crime Ordinance. In the majority opinion, Justice Scalia explained that the city had "sufficient means at its disposal to prevent [the defendant's] behavior without adding the First Amendment to the fire."<sup>61</sup> The New Jersey anti-bullying statute may also be challenged for opening the door to First Amendment challenges on the basis of content-discrimination.

The definition of harassment, intimidation, and bullying in the New Jersey Anti-Bullying Bill of Rights Act is very broad; the categories it enumerates characterize it as content-based on its face. The law restricts:

any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic,

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<sup>57</sup> *R.A.V.*, 505 U.S. at 384.

<sup>58</sup> Chemerinsky, *supra* note 49 (explaining that viewpoint neutrality does not permit the government to regulate speech due to its ideology).

<sup>59</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 819-20 (1995).

<sup>60</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

<sup>61</sup> *R.A.V.*, 505 U.S. at 396.

such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by another distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students.<sup>62</sup>

With the inclusion of the phrase, “substantially disrupts or interferes with the orderly operation of the school or the rights of other students,” the law is punishing unprotected speech that falls under the *Tinker* framework.<sup>63</sup> Thus, it is punishing speech that is unprotected under the First Amendment.

However, as demonstrated below, the New Jersey anti-bullying law selectively punishes certain unprotected student speech based upon the listener’s reaction to the speech and upon certain characteristics of the victim, rather than restricting *all* speech that is proscribed under *Tinker*, or all speech that “substantially disrupts or interferes with the orderly operation of the school or the rights of other students.”<sup>64</sup>

#### 1. Subject Matter Discrimination

In *R.A.V.*, individuals who used fighting words in the context of ideas *outside* of the ordinance’s enumerated categories would not be punished.<sup>65</sup> The majority provided examples of other characteristics such as “political affiliation, union membership, or homosexuality” that could be used as fighting words but that were not covered by the local law.<sup>66</sup> To some extent, the New Jersey Anti-Bullying Bill of Rights is similar to the St. Paul ordinance in *R.A.V.*, as it punishes bullying

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<sup>62</sup> N.J. STAT. ANN. § 18A:37-14 (West 2010).

<sup>63</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

<sup>64</sup> *Id.*

<sup>65</sup> *R.A.V.*, 505 U.S. at 391 (“[D]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.”).

<sup>66</sup> *Id.* at 391.

that may cause a substantial disruption only on the basis of *certain* motivating characteristics.<sup>67</sup> By enumerating particular categories, namely “race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability,” the New Jersey legislature may be challenged for committing the same error as the city of St. Paul.<sup>68</sup> The New Jersey anti-bullying law is seemingly punishing student speech on the basis of the subject matter or topic in its message.

After listing specific characteristics, the New Jersey legislature also added the phrase “or by any other distinguishing characteristic.”<sup>69</sup> This additional wording suggests that the legislature attempted to remain content-neutral and therefore within the bounds of *R.A.V.* While this catch-all provision may be intended to alleviate any concerns related to content discrimination, it may not save the statute from constitutional challenges. A potential challenger to this anti-bullying statute could argue that the state is targeting certain categories of substantial disruption or interference and leaving out others even with the use of this catch-all phrase.

A challenger could argue that the law nonetheless discriminates on the basis of subject matter. For instance, the phrase “distinguishing characteristic” may not reach bullying that is motivated by certain viewpoints held by a victimized student. Consider a student who is subjected to bullying by her peers due to her pro-choice beliefs. Is the student’s pro-choice viewpoint is a “distinguishing characteristic?” If school officials perceive it as such, the bully can be punished. If not, a student who bullies a peer who holds pro-choice viewpoints will not be punished, whereas a student who victimizes another student for his or her pro-life beliefs *can* be punished, as long as the victim’s pro-life stance stems from his or her religious beliefs— a characteristic enumerated in the statute. Therefore, the phrase “any other distinguishing characteristic” does not alleviate the concerns of content discrimination associated with

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<sup>67</sup> *Id.*

<sup>68</sup> N.J. STAT. ANN. § 18A:37-14 (West 2010).

<sup>69</sup> *Id.*



the statute.

## 2. Communicative Impact

The New Jersey Anti-Bullying Bill of Rights may also be challenged as content-based because it regulates student speech based on its effect on the listener. In other words, it restricts speech on the basis of its communicative impact. In the Third Circuit case of *Saxe v. State College Area School District*, the plaintiffs challenged a school district's anti-harassment policy on First Amendment grounds.<sup>70</sup> The school argued that the anti-harassment law's application to the students' expressive conduct was justified as a regulation of the speech's secondary effects and therefore an exception to the content neutrality principle of *R.A.V.*<sup>71</sup> The Third Circuit rejected this argument on the grounds that the Supreme Court has stated that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'"<sup>72</sup>

The New Jersey statute requires that the speech substantially disrupt or interfere with the operation of the school or the rights of other students.<sup>73</sup> It also requires that the restricted speech be that which "a reasonable person should know, under the circumstances, will have the effect of physically or *emotionally harming* a student or . . . placing a student in reasonable fear of . . . emotional harm to his person[.]"<sup>74</sup> The statute further requires that the speech have the "effect of insulting or demeaning any student or group of students[.]"<sup>75</sup> This terminology indicates that the statute aims to regulate a bully's speech because of its emotive impact on the victim. As the law punishes speech based on its communicative impact on the listener, it thereby raises constitutional concerns on the basis of

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<sup>70</sup> *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001).

<sup>71</sup> *Id.* at 209.

<sup>72</sup> *Id.* (citing *Boos v. Barry*, 484 U.S. 312, 321 (1988)).

<sup>73</sup> N.J. STAT. ANN. § 18A:37-14 (West 2010).

<sup>74</sup> N.J. STAT. ANN. § 18A:37-14 (West 2010) (emphasis added).

<sup>75</sup> *Id.*

content neutrality.

### III. THE APPLICATION OF THE CONTENT NEUTRALITY PRINCIPLE IN THE CONTEXT OF REGULATING STUDENT SPEECH IN PUBLIC SCHOOLS

Where a student's independent speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," courts are divided on whether the regulation on such speech must be content neutral.<sup>76</sup> The confusion on this issue arose from contradicting and confusing Supreme Court precedent beginning with the landmark case of *Tinker v. Des Moines Independent Community School District*.<sup>77</sup>

#### A. *Tinker v. Des Moines Independent Community School District*

The Supreme Court's decision in *Tinker* made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."<sup>78</sup> In *Tinker*, officials of a public school adopted a policy prohibiting students from wearing armbands to school.<sup>79</sup> The officials enacted this policy after they were informed that a group of high school students was planning on wearing black armbands to school in protest of the Vietnam War.<sup>80</sup> When the students decided to wear the armbands, they were suspended.<sup>81</sup> The students argued that their First Amendment rights had been violated and sought an injunction restraining the school from disciplining them.<sup>82</sup>

The Supreme Court agreed with the students and adopted a

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<sup>76</sup> *Tinker*, 393 U.S. at 513.

<sup>77</sup> *Id.* at 503.

<sup>78</sup> *Id.* at 506.

<sup>79</sup> *Id.* at 504.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Tinker*, 393 U.S. at 504.

balancing approach that had been previously employed by the Fifth Circuit.<sup>83</sup> The Court declared that a school cannot punish a student unless her speech “‘materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school’ and without colliding with the rights of others.”<sup>84</sup> The majority reasoned that a substantial disruption or a material interference could not have been reasonably “forecast” by the school officials.<sup>85</sup> Indeed, no actual disruption or interference occurred as the discussion of the armbands did not interfere with work inside the classroom.<sup>86</sup>

Although the *Tinker* standard was framed in the disjunctive, the second prong alone has rarely been relied upon. Following *Tinker*, most courts have focused on the first prong of the substantial disruption test.<sup>87</sup> The second prong, whether a student’s speech “collides with the rights of others,” has not earned as much attention.<sup>88</sup> Some courts have refused to apply the second prong due to the Supreme Court’s failure to define or clarify what it meant by the phrase “rights of others.”<sup>89</sup> In later cases, the Court narrowed the extent of *Tinker*’s reach.

The Supreme Court in *Tinker* also addressed the issue of content

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<sup>83</sup> *Id.* at 505.

<sup>84</sup> *Id.* at 513.

<sup>85</sup> *Id.* at 514.

<sup>86</sup> *Id.*

<sup>87</sup> Daniel B. Weddle, *You’re On Your Own Kid . . . But You Shouldn’t Be*, 44 VAL. U. L. REV. 1083, 1090 (2010).

<sup>88</sup> *Id.*

<sup>89</sup> Christine Metteer Lorillard, *When Children’s Rights “Collide”: Free Speech vs. the Right to Be Let Alone in the Context of Off-Campus “Cyber-Bullying”*, 81 MISS. L.J. 189, 210 (2011) (“Court is not aware of any authority . . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first.”) (citing *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1123 (C.D. Cal. 2010)).

neutrality in the context of regulating student speech.<sup>90</sup> The school policy prohibiting only black armbands was especially problematic to the Court because it was content-based. Instead of banning all armbands that were political or controversial, the school banned only those that conveyed a certain message.<sup>91</sup> The Court pointed out that some of the students wore buttons with Nazi symbols, but those viewpoints were not prohibited.<sup>92</sup> In effect, the students' expression—opposition to the war in Vietnam—was “singled out” by the school officials for punishment.<sup>93</sup> The Court stated that such viewpoint discrimination, “without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”<sup>94</sup> Some commentators argue that this statement by the Court seemingly acknowledged that the prohibition of a particular opinion could be justified as long as it amounted to a material disruption under *Tinker*'s framework.<sup>95</sup> In other words, the

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<sup>90</sup> *Tinker*, 393 U.S. at 510-11 (“It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol— black armbands worn to exhibit opposition to this Nation's involvement in Vietnam— was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 510.

<sup>93</sup> *Id.* at 511.

<sup>94</sup> *Id.* at 511.

<sup>95</sup> See Alexis Zouhary, *The Elephant in the Classroom: A Proposed Framework for Applying Viewpoint Neutrality to Student Speech in the Secondary School Setting*, 83 NOTRE DAME L. REV. 2227, 2237-38 (“Justice Fortas' libertarian tone causes some to overlook the Court's intimation that certain viewpoint-based regulations may be constitutionally valid in the school setting . . . the Court presumptively concede[d] that, in certain circumstances, the state can regulate speech on the basis of viewpoint.”); see also Mark W. Cordes, *Making Sense of High School Speech After Morse v. Frederick*, 17 WM. & MARY BILL OF RTS. J. 657, 663 (“[E]ven in applying a speech-protective standard in *Tinker*, the Court was sensitive to the fact that schools are not primarily designed for speech, and that normal free speech standards might need to be modified, though not abandoned altogether, in the school context.”).

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Court seemed to affirm that content discrimination could be permissible under such circumstances.

*B. Bethel School District No. 403 v. Fraser*

Over fifteen years after the *Tinker* decision, the Supreme Court again confronted an issue of student speech in public schools. In *Fraser*, a student was suspended for delivering a speech at a high school assembly.<sup>96</sup> Although the district court and the court of appeals both struck down the suspension on the basis that there was no substantial disruption or material interference under *Tinker*, the Supreme Court placed great emphasis on granting the state and its educators more leeway to curtail “vulgar,” “lewd, indecent or offensive speech” in schools.<sup>97</sup> Unlike the lower courts, the Supreme Court did not apply the “substantial disruption” test from *Tinker*.<sup>98</sup> The Court found the student’s language to be “offensively lewd and indecent speech,” and upheld his suspension.<sup>99</sup> In effect, speech in public schools that is “vulgar,” “lewd, indecent or offensive” is seemingly carved out as an exception to the *Tinker* analysis.<sup>100</sup>

Most importantly, the Court in *Fraser* closely examined what the majority in *Tinker* merely touched upon: the mission of public education, and the tension that arises when trying to balance students’ free speech rights with the interests of the state and local

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<sup>96</sup> *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). In his speech, the student stated, “I know a man who is firm— he’s firm in his pants, he’s firm in his shirt, his character is firm— but most of all, his belief in you, the students of Bethel is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts, he drives hard, pushing and pushing until finally— he succeeds. Jeff is a man who will go to the very end— even the climax— for each and every one of you. So vote for Jeff for ASB vice president— he’ll never come between you and the best our high school can be.” Brief of Petitioners at 3, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (No. 84-1667).

<sup>97</sup> *Fraser*, 478 U.S. at 683.

<sup>98</sup> *Id.* at 683.

<sup>99</sup> *Id.* at 685.

<sup>100</sup> *Id.* at 683.

government in its role as an educator.<sup>101</sup> When the Court declared that a student's constitutional rights are "not automatically coextensive with the rights of adults in other settings," it clarified that the legal analytical framework established in *Tinker* is not absolute.<sup>102</sup> As the Court later explained in *Morse v. Frederick*, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."<sup>103</sup> However, since "the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities," the Supreme Court permitted more restrictive speech regulations within the school setting.<sup>104</sup>

The Supreme Court has acknowledged that the analysis it utilized in *Fraser* "is not entirely clear."<sup>105</sup> Lower courts have interpreted *Fraser* as standing for the proposition that there is no First Amendment protection for "lewd," "vulgar," "indecent or offensive speech" in schools.<sup>106</sup> When dealing with the regulation of this particular type of student speech, courts apply a reasonableness standard that grants more deference to schools.<sup>107</sup>

In terms of the content neutrality principle, the *Fraser* Court indicated that no content discrimination was present because the school did not suspend the student to curtail the viewpoint he expressed.<sup>108</sup> Rather, the school punished the offensive mode of

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<sup>101</sup> *Id.* at 685. See Part III for a discussion on the importance of the state's role as educator and its countervailing interests in educating our youth.

<sup>102</sup> *Fraser*, 478 U.S. at 682.

<sup>103</sup> *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (citing *Fraser*, 478 U.S. at 682-83).

<sup>104</sup> *Fraser*, 478 U.S. at 688 (Brennan, J., concurring); see, e.g., Zouhary, *supra* note 98, at 2239.

<sup>105</sup> *Morse*, 551 U.S. at 404.

<sup>106</sup> *Fraser*, 478 U.S. at 678-80.

<sup>107</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>108</sup> *Fraser*, 478 U.S. at 685 ("Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any

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expression or the manner in which Fraser delivered the speech.<sup>109</sup> The Court pointed out that this case was different from *Tinker*, which involved core speech and the suppression of a political viewpoint.<sup>110</sup>

*C. Hazelwood School District v. Kuhlmeier*

The Supreme Court moved further away from *Tinker* in *Hazelwood School District v. Kuhlmeier*.<sup>111</sup> In that case, the school district censored two student-authored articles on teenage pregnancy and on divorce for the school newspaper.<sup>112</sup> The articles were censored on grounds that they involved inappropriate subjects.<sup>113</sup> The students' challenge of the suspension on First Amendment grounds did not succeed; the Court drew a distinction between independent student speech, which is subject to the *Tinker* test, and school-sponsored speech.<sup>114</sup> Instead of applying *Tinker's* substantial disruption test, the Court applied a reasonableness standard to school-sponsored speech that could be perceived as bearing the "imprimatur of the school."<sup>115</sup> School-sponsored activities are those that "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."<sup>116</sup>

The Court announced that schools can exercise control over the "style and content of student speech in school-sponsored activities so

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political viewpoint.").

<sup>109</sup> *Id.* at 681.

<sup>110</sup> *Id.*

<sup>111</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988).

<sup>112</sup> *Id.* at 262-64.

<sup>113</sup> *Id.* at 276.

<sup>114</sup> *Id.* at 273.

<sup>115</sup> *Id.* at 270-73.

<sup>116</sup> *Id.* at 271.

long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>117</sup> In applying this reasonableness standard, the majority held that the censorship was not an infringement on the students’ First Amendment rights.<sup>118</sup> Due to the schools’ valid pedagogical interest to regulate the content of these publications, the Court concluded that the school’s interest in regulating the curriculum outweighed the students’ interest in expressing themselves.<sup>119</sup>

The majority opinion did not address content neutrality, even though it was discussed in the parties’ briefs and during oral argument before the Court.<sup>120</sup> However, Justice Brennan’s dissent did address the issue. He accused the school officials and the Court of “camouflage[ing] viewpoint discrimination as the ‘mere’ protection of students from sensitive topics.”<sup>121</sup> At least two commentators have suggested that some of the Justices were simply not satisfied with the content neutrality requirement’s implications for school-sponsored speech, and, therefore, the Court did not address it in the majority opinion.<sup>122</sup> They point to the questions asked by the Justices during oral argument. For instance, Justice Scalia posed the following question about viewpoint discrimination to the attorney for the school district:

The principal could not exclude an article that discussed teenage sexuality and pregnancy of some of his students,

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<sup>117</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>118</sup> *Id.* at 275-76.

<sup>119</sup> *Id.*

<sup>120</sup> Transcript of Oral Argument at 21, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (No. 86-836).

<sup>121</sup> *Hazelwood*, 484 U.S. at 286 (Brennan, J., dissenting).

<sup>122</sup> Zouhary, *supra* note 98, at 2244 (suggesting that Justices were seemingly uncomfortable with the viewpoint neutrality requirement’s Catch-22 implications on school-sponsored speech); see Susannah Barton Tobin, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in Student Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 227 (2004) (indicating that some of the Justices may have been reluctant to include explicit abandonment of the viewpoint neutrality requirement in the student speech context).



and portrayed the whole thing in a favorable light— in effect, sanctioning promiscuity by the students— but permit an article that discussed the same topic, but seemed to frown upon that kind of activity. The principal could not take a position on a subject like that. If he allows sexuality to be talked about, he has to allow both the pros and the cons of adolescent sex to be set forth. Is that right?<sup>123</sup>

Due to the Supreme Court's evasiveness on content neutrality's application on the regulation of student speech, a circuit split emerged in the lower courts.<sup>124</sup> The Second, Ninth, and Eleventh Circuits maintain that the content neutrality principle still applies in the school context.<sup>125</sup> On the other hand, both the First and Tenth Circuits permit content-based regulations of student speech.<sup>126</sup> The Eight and Fifth Circuits have reached similar conclusions.<sup>127</sup> In the later student speech case of *Morse v. Frederick*, the Supreme Court again avoided directly addressing the content discrimination issue present in the context of regulating student speech.<sup>128</sup>

<sup>123</sup> Transcript of *Hazelwood* Oral Arguments, in LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1987 TERM SUPPLEMENT 385, 391 (Philip B. Kurland & Gerhard Casper eds., 1989).

<sup>124</sup> *E.g.*, *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 443 (4th Cir.), *cert. denied*, 134 S.Ct. 201 (2013) (“[The] Court has not expressly discussed the relationship between viewpoint discrimination and student speech.”).

<sup>125</sup> *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 629-33 (2d Cir. 2005); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004).

<sup>126</sup> *Ward v. Hickey*, 996 F.2d 448, 452-54 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-27 (10th Cir. 2002); *see Zouhary, supra* note 98, at 2244-45 (discussing the resulting circuit split after *Hazelwood School District v. Kuhlmeier*).

<sup>127</sup> *See B.W.A. v. Farmington R-7 Sch. Dist.* 554 F.3d 734, 740 (8th Cir. 2009) (“[V]iewpoint discrimination by school officials is not violative of the First Amendment if the *Tinker* standard requiring a reasonable forecast of substantial disruption or material interference is met.”); *Morgan v. Swanson*, 659 F.3d 359, 379 (5th Cir. 2011) (“Not only is there no categorical ban on viewpoint discrimination in public schools, our sister circuits have divided over the question.”).

<sup>128</sup> *Morse*, 551 U.S. at 436.

*D. Morse v. Frederick*

In *Morse*, a student was suspended from school for refusing to remove a banner that read “BONG HiTS 4 JESUS” that he displayed at a school-sponsored event across the street from his high school.<sup>129</sup> The Ninth Circuit applied the substantial disruption analysis from *Tinker* and ruled that the school’s actions violated the student’s free speech rights.<sup>130</sup> The Supreme Court, in a 5-4 decision, disagreed, concluding that the poster was not school-sponsored speech and that the *Kuhlmeier* reasonableness standard did not apply, the Court analyzed the issue under a different framework.<sup>131</sup>

Chief Justice Roberts’ majority opinion shaped the issue as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use.”<sup>132</sup> Essentially, the Court carved out an exception for drug-specific student speech. The Court reasoned that the “‘special characteristics of the school environment’ and the government interest in stopping student drug use . . . allow schools to restrict student expression that . . . promot[ed] illegal drug use.”<sup>133</sup>

The majority’s analysis of the narrower issue placed great emphasis on the harms of illegal drug abuse, stating, “[d]rug abuse by the Nation’s youth is a serious problem[,]” and that “Congress has declared that part of a school’s job is educating students about the dangers of drug abuse . . . and many . . . schools have adopted policies aimed at implementing this message.”<sup>134</sup> The Court indicated that the danger in the case— promoting illegal drug use among students— was “far more serious and palpable” than a simple desire

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<sup>129</sup> *Id.* at 397.

<sup>130</sup> *Id.* at 396.

<sup>131</sup> *Id.* at 393, 403.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 408.

<sup>134</sup> *Morse*, 551 U.S. at 395.

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by school officials to suppress an unpopular viewpoint.<sup>135</sup> The majority pointed to Congress's pronouncement that schools must "educat[e] students about the dangers of illegal drug use."<sup>136</sup> For these reasons, the government was reasonably restricting student speech to "protect those entrusted to their care."<sup>137</sup>

The dissenting justices criticized the majority for permitting school officials to prohibit certain viewpoints in the school context. Specifically, the dissent noted that the school punished the unpopular viewpoint of promoting student drug use during the national War on Drugs.<sup>138</sup> Although content discrimination was present, the majority and concurring justices emphasized that the speech at issue was not political discourse.<sup>139</sup>

The concurring justices made clear that they would not have upheld the suspension if the school had targeted speech with a political message. Specifically, Justice Alito wrote:

I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.<sup>140</sup>

The concurrence clarified that the punishment at issue was constitutional because illegal drug use amongst students is a unique threat to students' physical safety.<sup>141</sup> The school district argued that

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<sup>135</sup> *Id.* at 408.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 397.

<sup>138</sup> *Id.* at 447-48 (Stevens, J., dissenting).

<sup>139</sup> The majority wrote, "not even Frederick argues that the banner conveys any sort of political or religious message . . . this is plainly not a case about political debate over the criminalization of drug use or possession." *Id.* at 403.

<sup>140</sup> *Morse*, 551 U.S. at 422 (Stevens, J., dissenting).

<sup>141</sup> *Id.* at 425 (Alito, J., concurring).

the First Amendment permitted it to “censor any student speech that interferes with a school’s educational mission.”<sup>142</sup> The concurring justices rejected this argument for such broad authority, warning that the “educational mission” argument would grant school boards and officials dangerous clearance to curtail political speech on the basis of viewpoint discrimination.<sup>143</sup> Notably, the concurrence reiterated the majority’s reasoning when they warned that any argument for limiting the free speech standards in public schools would have to be grounded in “some special characteristic of the school setting.”<sup>144</sup> In *Morse*, the majority perceived the unique threat to students’ physical safety to be the special characteristic.<sup>145</sup>

*E. Current Complexity of Student Speech Standards*<sup>146</sup>

In *R.A.V.*, the Court explained that content discrimination is impermissible for any type of speech restriction, including restrictions on unprotected speech.<sup>147</sup> However, the question of whether the First Amendment principle of content neutrality applies to independent student speech that is proscribable under *Tinker*’s substantial disruption standard remains unclear.

The *Tinker* decision, and the Supreme Court cases on student speech that followed, demonstrate that independent student speech in public schools is analyzed under *Tinker* and can therefore only be regulated if it meets the substantial disruption test. However, this test does not apply if the facts of the case fall within one of three

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<sup>142</sup> *Id.* at 423 (Alito, J., concurring) (internal quotation marks omitted).

<sup>143</sup> *Id.* (Alito, J., concurring).

<sup>144</sup> *Id.* at 424-25 (Alito, J., concurring).

<sup>145</sup> *Id.*

<sup>146</sup> See Piotr Banasiak, *Morse v. Frederick: Why Content-Based Exceptions, Deference and Confusion are Swallowing Tinker*, 39 SETON HALL L. REV. 1059, 1091 (2009) (“[L]ower courts themselves have found school speech jurisprudence unclear and difficult to apply.”) (discussing the Court’s school speech doctrine after *Morse* and the application of *Morse* in lower courts) *Id.* at 1076-81.

<sup>147</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992).

categories.<sup>148</sup> The *Fraser* decision carved out the first exception to the *Tinker* standard by permitting schools to constitutionally restrict students' speech when the speech is "vulgar," "lewd, indecent[,] or offensive and would undermine the school's educational mission."<sup>149</sup> Second, the *Kuhlmeier* decision allows schools to regulate school-sponsored speech as long as the school's actions meet a reasonableness test. Their actions must be "reasonably related to legitimate pedagogical concerns."<sup>150</sup> Lastly, *Tinker* does not apply to student speech that may "reasonably be regarded as encouraging illegal drug use."<sup>151</sup>

Due to the Court's lack of unambiguous analysis or pertinent discussion regarding content discrimination or *R.A.V.* in the student speech cases that followed *Tinker*, a circuit split occurred in the lower courts surrounding whether the principle of content neutrality applies in the realm of regulating student speech.<sup>152</sup> At least one commentator has suggested that the Supreme Court's decision to not discuss *R.A.V.* in *Morse v. Frederick* indicates "either the Court does not deem *R.A.V.* applicable to the school setting or that *R.A.V.*'s precedential value is minimal in that context."<sup>153</sup>

<sup>148</sup> Amanda McHenry, *Combating Cyberbullying Within the Metes and Bounds of Existing Supreme Court Precedent*, 62 CASE W. RES. L. REV. 231, 238 (2011).

<sup>149</sup> *Bethel Sch. Dist., No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

<sup>150</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>151</sup> *Morse*, 551 U.S. at 397.

<sup>152</sup> For a discussion of the circuit split before *Morse v. Frederick*, see Zouhary, *supra* note 98, at 2244-47. Zouhary also points out that the decision in *Morse* confused the lower courts further. Her Note argues that the content-neutrality principle should be relaxed in the context of school-sponsored speech and that it should apply with full force to the regulation of independent student speech. *Id.* at 2252, 2261-67.

<sup>153</sup> Adam J. Speraw, *No Bullying Allowed: A Call for a National Anti-Bullying Statute to Promote a Safer Learning Environment in American Public Schools*, 44 VAL. U. L. REV. 1151, 1181 (2010).

**IV. CONTENT-BASED RESTRICTIONS SHOULD BE RELAXED IN PUBLIC SCHOOLS IN THE CONTEXT OF ANTI-BULLYING STATUTES**

Even if the New Jersey Anti-Bullying Bill of Rights and similar anti-bullying laws pose a content discrimination issue under *R.A.V.*, schools should be granted more leeway to regulate bullying, a danger to students, when it substantially disrupts the educational environment. Supreme Court precedent since its landmark student speech case in *Tinker* is contradictory and unclear. Most importantly, the Court has narrowed its *Tinker* holding by carving out a number of exceptions.<sup>154</sup> Although the Court in *R.A.V.* seemed to require the application of strict scrutiny to all content-based speech regulations, the unique conditions of the school setting and the state's role as educator both necessitate an alternate approach to restrictions on speech that constitutes bullying. Supreme Court precedent indicates the Court has been reluctant to apply *R.A.V.* and strict scrutiny to content-based regulations of student speech since *Tinker*.<sup>155</sup> This demonstrates that the principle of content neutrality should not be applied with the same rigor to evaluate regulations on student speech that involve bullying.

To comprehend the current status of First Amendment jurisprudence in public schools, we must take into account a recurring premise in the Supreme Court's decisions since *Tinker*. As discussed below, the Supreme Court has continuously acknowledged the interests of the state, local government, and school officials in carrying out the educational mission of their schools.<sup>156</sup> The Court's opinions following *Tinker* indicate that certain regulations on student speech in schools are permissible in order to carry out this unique mission.<sup>157</sup> Indeed, since *Tinker*, the Court has moved away from the

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<sup>154</sup> See Part III for a discussion of the Supreme Court's reluctance to apply *R.A.V.*'s content neutrality principle in the context of regulating student speech under the *Tinker* framework.

<sup>155</sup> See *id.*

<sup>156</sup> See *infra* Part IV.A.

<sup>157</sup> Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 445-48 (1999) (discussing the Supreme Court's school speech doctrine since *Tinker*) ("In more recent years . . . the Court has been much less protective of

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idea that public schools are a forum for the marketplace of ideas• a rationale for content neutrality that many argue has less force in the context of public schools.<sup>158</sup>

*A. The Role of States and Local Governments as Educators*

Repeatedly, Supreme Court precedent has acknowledged the interests of states and local governments, including school officials, in carrying out their educational mission. As one commentator explained, education “is the indivisible process of acquiring beliefs, premises, and dispositions that are our windows on the world, that mediate and filter our experience of it, and that govern our evaluation and judgment of it.”<sup>159</sup> Chief Justice Warren once wrote “[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship.”<sup>160</sup>

1. Supreme Court Precedent

The Supreme Court has recognized that public schools serve as “principal instrument[s]” in introducing children to cultural values, in preparing them for their future professional careers, and in assisting them to appropriately adjust to the environment beyond the schoolhouse gate.<sup>161</sup> The Court has consistently stressed that schools

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speech in school environments and much more deferential to school authorities.”). *Id.* at 445.

<sup>158</sup> See, e.g., KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 243* (2003) (stating that although this concern is more pressing at the university level of education, precedent shows that it is also relevant at the secondary level); see also Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Analysis*, 12 HASTINGS CONST. L. Q. 1, 4-5 (1984) (“[T]he Supreme Court has never held that the public school classroom is a marketplace of ideas, even though occasional suggestions to the contrary have appeared in dicta.”).

<sup>159</sup> Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1846-47 (2001).

<sup>160</sup> *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954).

<sup>161</sup> *Id.*

are places where we establish “fundamental values necessary to the maintenance of a democratic political system” and teach the “shared values of a civilized social order.”<sup>162</sup> The process of public education is a process of citizenship, and the Court has indicated that it is not one “confined to books, the curriculum, and the civics class.”<sup>163</sup> More importantly, the civic education process encompasses teaching by example. Therefore, schools are responsible for teaching the “shared values of a civilized social order.”<sup>164</sup>

The perception of the government’s unique role as educator was continuously echoed in student speech cases following *Tinker*. The majority in *Tinker* expressed the concern that permitting schools to silence student political expression that was not disruptive could transform schools into “enclaves of totalitarianism.”<sup>165</sup> Justice Black’s dissent rejected this concern, and stressed that the Constitution does not compel our “teachers, parents and elected school officials to surrender control of the American public school system to public school students.”<sup>166</sup>

The Court in *Fraser* mirrored Justice Black’s concern for the execution of the state’s educational mission. Chief Justice Burger, speaking for the majority, wrote that “the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board” rather than with judges.<sup>167</sup> The Court also acknowledged that a student’s freedom to express an unpopular and controversial viewpoint in school “must be balanced against . . . society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”<sup>168</sup> More

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<sup>162</sup> Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 683.

<sup>165</sup> *Tinker*, 393 U.S. at 511.

<sup>166</sup> *Id.* at 526 (Black, J., dissenting).

<sup>167</sup> *Fraser*, 478 U.S. at 683.

<sup>168</sup> *Id.* at 682.



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importantly, the Court wrote that a student's constitutional rights are "not automatically coextensive with the rights of adults in other settings."<sup>169</sup>

In *Kuhlmeier*, the Court again echoed these ideas. In quoting *Fraser*, the *Kuhlmeier* Court clarified that a school does not have to accept student speech that is "inconsistent with its 'basic educational mission.'"<sup>170</sup> Schools may regulate such speech despite the fact that the government may not censor similar speech in a different context. The Court made clear that a student's First Amendment rights must be considered in this unique context.<sup>171</sup> In *Morse v. Frederick*, the Supreme Court reaffirmed *Fraser's* declaration that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" in light of the "special characteristics of the school environment."<sup>172</sup> Concurring in the judgment, Justice Thomas acknowledged that the Court, "continue[s] to distance [itself] from *Tinker*, but [it] neither overrule[s] it nor offer[s] an explanation of when it operates and when it does not."<sup>173</sup>

The Supreme Court's precedent at least indicates that the principle of content neutrality does not apply with the same rigor in the realm of student speech when the speech at issue collides with the school's "educational mission."<sup>174</sup> As one commentator has suggested, the Court has had numerous opportunities to clarify this exact issue, yet it has chosen not to do so.<sup>175</sup> Accordingly, many lower

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<sup>169</sup> *Id.*; see also *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (Powell, J., concurring) (emphasizing the "special characteristics" of the school setting "that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a non-school setting.").

<sup>170</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (quoting *Fraser*, 478 U.S. at 685).

<sup>171</sup> *Id.* at 682

<sup>172</sup> *Morse*, 551 U.S. at 396-97.

<sup>173</sup> *Id.* at 418 (Thomas, J., concurring).

<sup>174</sup> *Morse*, 551 U.S. at 399 (internal citation omitted).

<sup>175</sup> Zouhary, *supra* note 98, at 2250 nn.185-86.

courts have reinforced the “educational mission” rationale to permit content discrimination in the regulation of student speech.<sup>176</sup>

## 2. Lower Court Precedent

Subsequent cases in the lower courts have echoed the importance of the role of the state as educator, and the deference that should be granted to a government’s judgment in fulfilling that role.<sup>177</sup> The Third Circuit case of *Sypniewski v. Warren Hills* is an example of a court granting the state the flexibility necessary to execute its educational mission. In *Sypniewski*, the Third Circuit dismissed a content discrimination challenge to a public school’s anti-harassment policy on the basis of public schools’ unique mission of educating the nation’s youth.<sup>178</sup> The plaintiffs challenged the policy as too narrow because it targeted only racially provocative expression for punishment and thereby amounted to content discrimination. The plaintiffs argued that although the school district was able to sanction speech that is disruptive under *Tinker*, the content neutrality principle did not allow the school to discriminate between disruptive speech that embodies racially oriented themes and disruptive speech that does not.<sup>179</sup>

The Third Circuit acknowledged that the racial anti-discrimination policy was content-based and would most likely be found unconstitutional under *R.A.V.* in a different context. However, due to the uniqueness of the public school setting and the critical function of the state and local governments as educators, the court reasoned it was the government’s responsibility to “maintain . . . an environment conducive to fulfilling [its] educational mission.”<sup>180</sup> The

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<sup>176</sup> See Part IV.A.2.

<sup>177</sup> See McHenry, *supra* note 151, at 239-43.

<sup>178</sup> *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 267 (3rd Cir. 2002) *cert. denied*, *Warren Hills Reg’l Bd. of Educ. v. Sypniewski*, 538 U.S. 1033 (2003).

<sup>179</sup> *Id.* This argument is very similar to the potential content discrimination challenge to the New Jersey Anti-Bullying Bill of Rights; see *supra* Part II.C.

<sup>180</sup> *Id.* at 268.

court deemed this responsibility, “perhaps the most important function of state and local governments.”<sup>181</sup> The decision emphasized a court’s need to defer to the judgments of state and local governments, granting them enough flexibility to carry out their educational mission.

In *Sypniewski*, the Third Circuit paid “due respect . . . to the needs of school authority,” and permitted content discrimination in its racial anti-discrimination policy as a result.<sup>182</sup> The court placed great emphasis on the fact that the school district had identified a certain class of speech— racial speech— that was “subject to a well-founded fear of conflict” *because* of its content.<sup>183</sup> The school district’s well-founded fear of conflict due to racial harassment was grounded in the history of disruption and interference with the legitimate rights of other students.<sup>184</sup> To exercise its educational mission and maintain order within the school, the Third Circuit permitted the district to enact unambiguous rules of conduct that “narrowly target[ed] the identified problems.”<sup>185</sup>

The Third Circuit did not engage in *R.A.V.*’s content discrimination framework, but it emphasized that it was “not entirely clear” how the framework was applied to an analysis of this realm of free speech.<sup>186</sup> Nonetheless, the Court held that “adopting a policy limited to racially provocative speech was an acceptable non-discriminatory response by school authorities to the history of race relations in Warren Hills’ schools.”<sup>187</sup> In other words, the school district had a legitimate basis to enact the formal policy. The court acknowledged that such content discrimination would be

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<sup>181</sup> *Id.* (citing *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954)).

<sup>182</sup> *Id.* at 268.

<sup>183</sup> *Id.*

<sup>184</sup> *Sypniewski*, 307 F.3d at 247-49.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 268-69.

unconstitutional in a context outside of the school setting.<sup>188</sup> The Third Circuit also warned that when a school illegitimately distinguishes between subclasses of proscribable disruptive speech under *Tinker*, the *R.A.V.* content neutrality principle might be implicated on grounds that the school is disfavoring certain views expressed by the students.<sup>189</sup>

In a later case, the same court reinforced the substantial leeway granted to school administrators, especially in the elementary school setting, when it stated that, “where an elementary school’s purpose in restricting student speech within an organized and structured educational activity is reasonably directed towards preserving its educational goals, we will ordinarily defer to the school’s judgment.”<sup>190</sup>

*B. The Marketplace of Ideas Theory Has Less Force in the Context of Public Schools*

Supreme Court precedent since *Tinker* demonstrates that the marketplace of ideas theory, a traditional justification for the principle of content neutrality, has less force in the public school setting.<sup>191</sup> Unlike other public forums, the public school classroom is not one where “teachers, parents and elected school officials . . . [must] surrender control of the American public school system to public school students.”<sup>192</sup> As discussed in Part IV.A. above, since *Tinker*, courts in student speech cases have repeatedly emphasized the government’s unique role as educator— a countervailing interest of maintaining a productive educational atmosphere.

Many agree that pupils in the secondary school context, unlike adults and students in universities, make limited contributions to the

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277-78 (3d Cir. 2003).

<sup>191</sup> *See supra* Part III.

<sup>192</sup> *Tinker*, 393 U.S. at 526 (Black, J., dissenting).

marketplace of ideas.<sup>193</sup> It is appropriate to limit the application of the marketplace of ideas theory to the public school context, because public school pupils have not reached a level of maturity permitting them to make informed decisions. As Judge Posner posited, “[H]igh-school students are not adults, schools are not public meeting halls, children are in school to be taught by adults rather than to practice attacking each other with wounding words, and school authorities have a protective relationship and responsibility to all the students.”<sup>194</sup>

In addition, content-based discrimination is deemed problematic because it creates “the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas . . . or manipulate the public debate through coercion rather than persuasion.”<sup>195</sup> In the context of bullying in public schools, the regulation of such speech will most likely not curtail the expression of a political viewpoint like the school district did in *Tinker*. For this reason, among others, there is less of a concern that regulating student speech on the basis of content could lead schools to become “enclaves of totalitarianism.”<sup>196</sup>

### C. Preventing Bullying is a Reasonable Educational Goal

To fulfill their roles as educators and carry out their educational missions, states and local governments must have sufficient leeway to prevent and halt bullying in our public schools. As one court indicated, the issue of bullying in our public schools is “pervasive; it is perceived by educators as serious, particularly in the middle school years. . . . It is the most common type of violence in our schools.”<sup>197</sup>

<sup>193</sup> See Lisa C. Connolly, *Note: Anti-Gay Bullying in Schools— Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U.L. REV. 248, 265-66 (2012); Saunders, *supra* note 161, at 247-49 (citing John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 338 (1979)).

<sup>194</sup> Nuxoll *ex rel* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674-75 (7th Cir. 2008).

<sup>195</sup> Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994).

<sup>196</sup> *Tinker*, 393 U.S. at 511.

<sup>197</sup> T.K. v. New York City Dept. of Educ., 779 F. Supp. 2d 289, 297 (E.D.N.Y. 2011) (citing Michaela Gulemetova et al., *Findings From the National Education Association’s Nationwide Study of Bullying: Teachers’ and Education Support Professionals’*

More importantly, bullying disturbs a student's "school performance, emotional well-being, mental health, and social development."<sup>198</sup> In *Sypniewski*, the Third Circuit stated that intimidating another student, including name-calling, was exactly the type of conduct that "schools are expected to control or prevent."<sup>199</sup> In light of this, the court quipped, "[t]here is no constitutional right to be a bully."<sup>200</sup>

At the 2010 Federal National Bullying Summit in Washington, D.C., Secretary of Education Arne Duncan gave the following remarks: "A school where children don't feel safe is a school where children struggle to learn. It is a school where kids drop out, tune out, and get depressed." The Secretary advised "[b]ullying is definable" and "[g]ood prevention programs work to reduce bullying."<sup>201</sup> Preventing bullying in our schools is a reasonable education goal of state and local governments, as it is a pervasive and serious issue that disturbs a student's educational experience.

#### 1. Empirical Research Findings: Bullying in Public Schools

Studies on bullying support what many courts and legislatures now acknowledge: bullying is a dangerous impediment to the goals of public education. The bullying issue entered public consciousness after the media publicized a number of student suicides, including that of New Jersey's very own Tyler Clementi.<sup>202</sup> Since then,

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*Perspectives*, in White House Conference on Bullying Prevention, at 11-12 (Mar. 10, 2011), [available at](http://www.stopbullying.gov/references/white_house_conference/index.html) [http://www.stopbullying.gov/references/white\\_house\\_conference/index.html](http://www.stopbullying.gov/references/white_house_conference/index.html); GAYLE L. MACKLEM, BULLYING AND TEASING: SOCIAL POWER IN CHILDREN'S GROUPS 42-47 (2003).

<sup>198</sup> *T.K.*, 779 F. Supp. 2d at 298 (citing Tonja R. Nansel et al., *Cross-national Consistency in the Relationship Between Bullying Behaviors and Psychosocial Adjustment*, 158 ARCHIVE OF PEDIATRIC & ADOLESCENT MED. 730, 733-35 (2004)).

<sup>199</sup> *Sypniewski*, 307 F.3d at 264.

<sup>200</sup> *Id.*

<sup>201</sup> Duncan, *supra* note 2.

<sup>202</sup> See Dale Archer, *5 Important Lessons From 4 Tragic Bullying Deaths*, FOX NEWS (Oct. 7, 2010), <http://www.foxnews.com/opinion/2010/10/07/dr-dale-archer-tyler-clementi-seth-walsh-asher-brown-billy-lucas-teenboys-gay>.

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researchers have studied the issue more elaborately. As of 2014, approximately forty-nine states have enacted legislation against school speech that constitutes bullying.<sup>203</sup> New Jersey enacted the Anti-Bullying Bill of Rights Act after a year of research on the harms and detrimental effects of bullying in the school setting.<sup>204</sup> Such research has aided states and local governments in drafting and implementing their anti-bullying legislation. The research confirms that bullying in the school environment affects both the victims and the bullies' ability to perform in the classroom, their desire to learn, as well as their decisions to attend school on a day-to-day basis.

The findings indicate that the bullying issue is pressing and ongoing. Eight percent of students miss one day of class per month for fear of encountering a bully.<sup>205</sup> Every seven minutes, a student is bullied on their school's playground, and in 85 percent of instances, there is no intervention by a peer or an adult.<sup>206</sup> Various studies have found that missing school due to a fear of victimization "not only impair[s] academic achievement, but also hinder[s] future financial and educational opportunities."<sup>207</sup> Empirical data on bullying confirms that bullying is psychologically detrimental to both bullies and victims.

The New Jersey Department of Education's report on the implementation of the anti-bullying law explains that bullying generally starts in elementary school, and peaks in sixth through eighth grade. It persists throughout high school but it decreases with age.<sup>208</sup> The statistics of the Commissioner's Annual Report reveal that

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<sup>203</sup> BullyPolice.Org, *supra* note 5.

<sup>204</sup> *Garden State Equality Factsheet: The Anti-Bullying Bill of Rights*, NJBULLYING.ORG, available at <http://njbullying.org/documents/FactsheetfortheAnti-BullyingBillofRights.pdf>.

<sup>205</sup> N.J. DEP'T OF EDUC., *supra* note 15, at 3.

<sup>206</sup> *Id.*

<sup>207</sup> Robert F. Valois, et al., *Peer Victimization and Perceived Life Satisfaction Among Early Adolescents in the United States*, AM. J. HEALTH EDUC., Sept. 1, 2012 (available on LexisNexis) (study evaluating 1,253 middle school students and analyzing how their victimization affected their life satisfaction).

<sup>208</sup> N.J. DEP'T OF EDUC., *supra* note 15 (citing *Commissioner's Annual Report to the*

thirty percent of U.S. students in sixth through tenth grade are “involved in moderate or frequent bullying either as bullies, as victims, or as both.”<sup>209</sup> In addition, the detrimental effects of bullying on students include serious psychological and behavioral effects that manifest themselves in low self-esteem, anxiety, depression, suicide, violence, and criminal behavior.<sup>210</sup>

Bullying has an especially problematic effect on academic performance; it compromises the feeling of safety associated with a school’s learning environment. Studies show that poor grades are a major consequence of the bullying behavior.<sup>211</sup> Additionally, when a student witnesses bullying without adult intervention, the student begins to assume that the school and the adults are taking an apathetic approach to the issue.<sup>212</sup> Ineffective regulation of bullying in the school environment consequently sends the wrong message to students.

Research and experience demonstrate that bullying disturbs the learning environment. As Secretary Duncan made clear, “bullying is very much an education priority that goes to the heart of school performance and school culture.”<sup>213</sup> In accordance with its *in loco parentis* role as educator, the government should be able to combat the bullying problem without grappling with the complex issues of remaining content neutral.

## V. CONCLUSION

New Jersey’s revised and reinvigorated anti-bullying law and

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*Education Committee of the Senate and General Assembly on Violence, Vandalism and Substance Abuse in New Jersey Public Schools* (July 1, 2009 to June 30, 2009)).

<sup>209</sup> N.J. DEP’T OF EDUC., *supra* note 15, at 2 (citing ERICSON, 2001).

<sup>210</sup> *Id.*

<sup>211</sup> See Jaana Juvonen, et al., *Bullying Experiences and Compromised Academic Performance Across Middle School Grades*, 31 J. EARLY ADOLESCENCE 152 (2011).

<sup>212</sup> *Effects of Bullying*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, available at <http://www.stopbullying.gov/laws/federal> (last visited Mar. 5, 2013).

<sup>213</sup> Duncan, *supra* note 2.



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similar anti-bullying laws may face constitutional challenges on the basis of content-discrimination. However, schools should be given greater leeway when regulating bullying that substantially disrupts the educational environment. Since its decision in *Tinker v. Des Moines Independent Community School District*, the Supreme Court has granted more deference to the judgment of school officials. In addition, courts and scholars have reasoned against application of the marketplace of ideas rationale to student speech in public schools. Content discrimination should be permitted in this realm of free speech regulation because bullying impedes the state's ability to exercise its role and duty as educator.

Our society's commitment to freedom of speech must be balanced with the government's need to educate our students. Students' free speech interests in the context of bullying legislation must give way to other countervailing concerns, especially when dealing with punishing student speech that constitutes bullying—a pervasive issue that frustrates and impedes the execution of the government's educational mission.

At the White House Conference on Bullying Prevention in March 2011, Secretary of Education Arne Duncan stated:

I am convinced that we are moving toward a day when students will be safe from taunts, teasing, and physical violence in our schools. This work won't be easy. This requires a fundamental cultural shift in our schools. . . . Bullying is a moral and educational issue. It goes to the heart of school performance and the ability of a student to learn.<sup>214</sup>

One commentator has suggested, "What could be more 'substantially disruptive' to the smooth functioning of an education institution than students who are afraid to come to school or who are miserable once they arrive?"<sup>215</sup>

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<sup>214</sup> Arne Duncan, U.S. Sec'y of Education, *White House Conference on Bullying Prevention: Enough is Enough* (Mar. 10, 2011), available at <http://www.ed.gov/news/speeches/enough-enough-secretary-duncans-remarks-white-house-conference-bullying-prevention> (last visited May 20, 2014).

<sup>215</sup> Matthew Earhart, *Bullying: What's Being Done and Why Schools Aren't Doing More*,

What a student can express through speech that constitutes bullying he or she can also express without bullying. The disruptive nature of this type of speech, as well as the state's pressing interest in carrying out its educational mission, are both countervailing interests that should grant educators limited leeway to implement content-based restrictions in their regulation of bullying in the public school setting. Due to the compelling imperative of effectively educating our youth in a safe and conducive environment, the principle of content neutrality should not apply or should at least be relaxed in the context of restricting student speech that constitutes bullying.